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No. 94-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERGNAUD AIMABLE, *et al.*,
Petitioners,

v.

LONG & SCOTT FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Motion for Leave To File Brief Amici Curiae And Brief Amici Curiae of United Farm Workers of America, AFL-CIO; Farm Labor Organizing Committee, AFL-CIO; Pineros y Campesinos Unidos del Noroeste, Inc.; International Brotherhood of Teamsters, AFL-CIO; General Teamsters, Warehousemen and Helpers Union, Local 890; Union de Trabajadores Agricolas de la Frontera; Farmworkers Association of Florida, Inc.; Comite de Apoyo a los Trabajadores Agricolas, Inc.; National Council of La Raza; Mexican American Legal Defense and Educational Fund; Migrant Clinicians Network; Association of Farmworker Opportunity Programs In Support of the Petition

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE FOR UNITED FARM WORKERS OF AMERICA, AFL-CIO, *et al.* IN SUPPORT OF THE PETITION

Pursuant to Rule 36.3 of this Court, the movants, who are described below, request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioners have consented to the filing of this brief. This motion is made necessary because counsel for the respondent has not granted its consent.

The proposed *amici* are organizations that represent and provide a variety of services to tens of thousands of migrant and seasonal farmworkers across the United States. The United Farm Workers of America, AFL-CIO; Farm Labor Organizing Committee, AFL-CIO; Pineros y Campesinos Unidos del

Noroeste, Inc. (Northwest Treeplanters and Farmworkers United); International Brotherhood of Teamsters, AFL-CIO; General Teamsters, Warehousemen and Helpers Union, Local 890; and Union de Trabajadores Agricolas de la Frontera (Border Agricultural Workers Union) are labor unions that engage in labor organizing, collective bargaining, and efforts to enforce legal protections for farmworkers. They represent farmworkers in California, Florida, Ohio, Oregon, Texas, Washington, and other states.

Amici Farmworker Association of Florida, Inc. and Comite de Apoyo a los Trabajadores Agricolas, Inc. (Farmworkers Support Committee) are community-based membership organizations which seek to protect migrant workers from abuse and discrimination and provide a variety of services to their farmworker members in Florida, New Jersey, Pennsylvania, Puerto Rico, and elsewhere.

The National Council of La Raza and the Mexican-American Legal Defense and Educational Fund are national advocacy organizations seeking to protect the rights of people of Hispanic descent, including farmworkers. The Association of Farmworker Opportunity Programs is a national association of agencies that provide farmworkers with employment opportunities, training and supportive services. Finally, the Migrant Clinicians Network is a national organization of health care providers who serve farmworkers and their families. In their work, all of the *amici* seek to preserve the rights of farmworkers under, *inter alia*, the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").

The opinion in *Aimable v. Long and Scott Farms, Inc.*, 20 F.3d 434 (11th Cir. 1994), threatens to eviscerate farmworkers' rights to the minimum wage and other basic protections guaranteed by the FLSA and the AWPA. Congress explicitly recognized that growers frequently seek to shift responsibility for such minimum protections to farm labor contractors, or "crewleaders," who commonly work as labor intermediaries in agriculture and who often are unwilling or unable to meet their

legal obligations under these statutes. To prevent such an evasion of these laws, which would place competitive pressure on law-abiding growers to do the same, Congress imposed joint responsibility for compliance with the FLSA and the AWPA on all entities on whom a worker is economically dependent.

The proposed *amici* can provide the Court with valuable assistance in determining whether to grant the petition for *certiorari*. These organizations have worked for many years with many thousands of farmworkers on the issues directly involved here. The farmworkers represented and served by these organizations are the very persons whom these statutes protect. This case also directly affects the ability of farmworker organizations, including the proposed *amici*, to effectively enforce these laws. Moreover, many of these organizations previously have submitted *amicus* briefs to this Court on other issues affecting farmworkers. *See, e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990).

Based on their long and extensive experience in agricultural labor relations, the proposed *amici* believe that if the appellate court's decision in *Aimable* is allowed to stand, and is followed by other courts, the effects will be devastating. The economic relationships among the petitioners, the crewleader and the respondent grower in this case are common in agriculture. If these 206 petitioners are relegated to securing relief only from an insolvent crewleader, then tens of thousands of other farmworkers will suffer the same fate. It is vitally important to the *amici* and to farmworkers throughout the nation that the Eleventh Circuit decision be reversed.

Accordingly, the movants seek to submit the attached *amici curiae* brief in support of the petition for writ of certiorari.

Respectfully submitted,

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BRIEF AMICI CURIAE FOR UNITED FARM WORKERS OF AMERICA, AFL-CIO, *et al.* IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

The *amici*, on behalf of themselves and the tens of thousands of farmworkers they represent and serve, respectfully urge the Court to grant a writ of certiorari in this matter.

Amici United Farm Workers of America, AFL-CIO; Farm Labor Organizing Committee, AFL-CIO; Pineros y Campesinos Unidos del Noroeste, Inc. (Northwest Treeplanters and Farmworkers United); International Brotherhood of Teamsters, AFL-CIO; General Teamsters, Warehousemen and Helpers Union, Local 890; and Union de Trabajadores Agricolas de la

Frontera (Border Agricultural Workers Union) are labor unions that engage in labor organizing, collective bargaining and efforts to enforce legal protections for farmworkers. They represent farmworkers in California, Florida, Ohio, Oregon, Texas, Washington and other states.

Amici Farmworker Association of Florida, Inc. and Comite de Apoyo a los Trabajadores Agricolas, Inc. (Farmworkers Support Committee) are community-based membership organizations which seek to protect migrant workers from abuse and discrimination and provide a variety of services to their farmworker members in Florida, New Jersey, Pennsylvania, Puerto Rico and elsewhere.

Amici National Council of La Raza and the Mexican-American Legal Defense and Educational Fund are national advocacy organizations seeking to protect the rights of people of Hispanic descent, including farmworkers. *Amicus* Association of Farmworker Opportunity Programs is a national association of agencies that provide farmworkers with employment opportunities, training and supportive services. Finally, *amicus* Migrant Clinicians Network is a national organization of health care providers who serve farmworkers and their families. In their work, all of the *amici* seek to preserve the rights of farmworkers under, *inter alia*, the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").

ARGUMENT

INTRODUCTION

The opinion in *Aimable v. Long and Scott Farms, Inc.*, 20 F.3d 434 (11th Cir. 1994), threatens to eviscerate farmworkers' rights to the minimum wage and other basic protections guaranteed by the FLSA and the AWPA. Two of Congress' objectives in enacting the FLSA and the AWPA were to eliminate the detrimental effect of substandard wages and working conditions on workers and society and to prohibit any company from gaining a competitive advantage by paying meager wages or

providing substandard working conditions. Congress explicitly recognized that farm labor contractors or "crewleaders," who commonly work as labor intermediaries in agriculture, are often unwilling or unable to comply with minimum labor protections. It also noted that growers have used crewleaders to undercut labor standards and gain a competitive advantage. Congress addressed these abuses by imposing joint liability on all entities on whom a worker is economically dependent.

As a practical matter, the protections of the FLSA and the AWPA are only meaningful if the farmworker is found to be an employee of the grower, not just the crewleader. The ability of a farmworker to enforce these statutes against the grower depends entirely on the scope of the joint employer doctrine.

The economic relationships among the petitioners, the crewleader and the respondent grower in this case are common in agriculture. The grower here had a substantial investment in its farming operation, controlled every major aspect of the production and marketing process and simply hired an unskilled farm labor contractor to recruit and supervise the day-to-day work of the unskilled farmworkers who harvested and packed its vegetables. The notorious crewleader involved in this action, John Miller, Jr., had no particular expertise, provided no significant harvesting or packing equipment and was actively supervised by the corporate grower's representatives. In such circumstances, the farmworkers are economically dependent both on their labor contractor and the respondent corporation.

Aimable drastically curtails the joint employer doctrine by holding irrelevant or inconsequential several criteria which this Court and other circuit courts have recognized to be central to a determination of joint employer status. In its narrow view these criteria would be relevant only to determine whether workers are independent contractors rather than employees, but not to determine whether the workers are jointly employed by a grower and a crewleader. The Eleventh Circuit's contrary conclusion is based on a misconception of the joint employer doctrine and conflicts with the decisions of this Court and other circuit courts.

Moreover, the harms produced by the Eleventh Circuit's decision are precisely those which Congress enacted the AWPA and the FLSA to avoid. By relegating farmworkers to a remedy solely against their crewleader, the Eleventh Circuit has effectively denied these workers any real remedy. Crewleaders frequently lack any substantial resources to pay the judgments against them. Indeed, the petitioners' crewleader, John Miller, Jr., is currently in bankruptcy proceedings. In addition, law-abiding growers who ensure that their farmworkers receive the minimum wage and other protections guaranteed by law will suffer a competitive disadvantage vis-a-vis other growers who are willing to profit from the loophole created by the Eleventh Circuit decision and rely on unscrupulous crewleaders to reduce their labor costs. The losers are the farmworkers for whom the minimum wage and other statutory protections of the AWPA and the FLSA are crucial bulwarks against impoverishment. It is vitally important to the *amici* and their farmworker members throughout the nation that the Eleventh Circuit decision be reversed.

I. GROWERS COMMONLY HIRE CREWLEADERS WHO VIOLATE FARMWORKERS' RIGHTS TO THE MINIMUM WAGE AND OTHER BASIC LABOR PROTECTIONS

A. A Demographic Profile of Farmworkers

Migrant and seasonal farmworkers are the poorest of the working poor, laboring long hours for low pay in difficult conditions. They "remain today, as in the past, the most abused of all workers in the United States." H.R. Rep. No. 885, 97th Cong. 2d. Sess. 2, *reprinted in* 1982 U.S.C.C.A.N. 4547, 4548 ("H.R. Rep. No. 885"). Moreover, "(a)s a group, they are . . . without public voice or power to make their way or improve their lot." R. Goldfarb, *Migrant Farm Workers: A Caste of Despair* 4 (1981) ("*Caste of Despair*").

Approximately 2.5 million men, women and children[1] perform paid agricultural labor. *Report of the Commission on Agricultural Workers* at 1 (1992) ("Commission Report").[2] The majority of farmworkers reside permanently in Florida, Puerto Rico, Texas and California. The traditional migrant streams, which followed the harvest up the east coast, through the midwest and along the west coast, have eroded. *See* E. Dement, *Out of Sight, Out of Mind: An Update on Migrant Farmworker Issues in Today's Agricultural Labor Market*, (National Governor's Association Working Paper, 1985) ("*Out of Sight, Out of Mind*"). Now "migrants from Florida . . . [can] be found in Washington State[;] . . . Puerto Rican and Florida workers . . . [can be] found regularly in California, while California migrants . . . [are] found in New Jersey. . . ." *Id.* at 21. In addition, many farmworkers live year round in the areas of their employment.

"Since the mid-1980's, the living and working conditions of hired farmworkers have changed, but seldom improved. Nominal wages have increased, . . . , but . . . real wages . . . [have]

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[1] Because of the low wages farmworkers earn, migrant children as young as eight years old often work alongside their parents in the fields. *A Caste of Despair* at 158. *See Hearing on the Migrant and Seasonal Agricultural Worker Protection Act Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 97th Cong., 2nd Sess. 22 (1982) (reporters testified that they saw children working in every field and grove they visited in Florida); *Reauthorization of Expiring Federal Elementary and Secondary Education Programs, Chapter 1 of the Education Consolidation and Improvement Act: Hearings on H.R. 5 & H.R. 950 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 223 (1987) (testimony of John D. Perry, Senior Project Consultant, Interstate Migrant Education Council).

[2] The Commission on Agricultural Workers was authorized by Section 304 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA"). Congress instructed the Commission to address issues concerning the effects of immigration reform on the agricultural labor market.

fall[en]." Commission Report at xix. On average, migrant farmworkers earn approximately $5,000 per year and work only an average of twenty-five weeks per year in agriculture. United States Department of Labor, *Migrant Farmworkers: Pursuing Security in an Unstable Labor Market* 31, Research Rept. No. 5 (1994). "The lack of full-time and year-round work combined with low wages relegates two-thirds (63%) of migrant farmworkers to living below the poverty line." *Id.* Their employment is also extremely vulnerable to the uncertainties posed by drought, crop disease and insects, equipment failure, poor market conditions or an over-supply of labor. *See, e.g., Out of Sight, Out of Mind* at 25. When such a disaster occurs farmworkers "can find them-selves suddenly out of work, without any form of income, and in completely unfamiliar surroundings where emergency relief may be almost unobtainable." *Id.*

"[F]armworkers . . . remain a marginal group in American society . . . . Limited educational attainment, lack of transferable job skills, language, and cultural factors all inhibit their assimilation into the mainstream." M. Edid, *Farm Labor Organizing: Trends & Prospects* 11 (1994) ("Edid"). As the Commission on Agricultural Workers noted, large labor surpluses, the increasing use of farm labor contractors and farmworkers' "essential[] powerless[ness] . . . in relation to agricultural employers" all hinder their efforts to improve their wages and working conditions.

B. Crewleaders are Commonly Used to Recruit and Supervise Migrant and Seasonal Farmworkers

Aimable involves a grower's use of a farm labor contractor or "crewleader." Crewleaders are "the middlemen who recruit and manage labor . . . ." Edid at 11; H.R. Rept. No. 885 at 2 ("The focus of the 1963 Act . . . was clearly the crew leader, a middleman who recruited, transported and supervised migrant and seasonal workers . . .").

The crewleader's role as recruiter is very common across the United States. Approximately 28% of all harvest workers are directly hired by farm labor contractors. Office of Program

Economics, United States Department of Labor, *United States Farmworkers in the Post-IRCA Period, Based on Data from the National Agricultural Workers Survey* 59 (1993) ("NAWS Study").[3] In California a recent study found that one-fifth of the state's farms hired workers indirectly through farm labor contractors. P. Martin, *California's Farm Labor Market* 19, Univ. of Cal. Issues Paper No. 87-1 (1987). Another study reported that the "most common method used by growers throughout the eastern United States to meet their labor needs is the use of farm labor contractors (FLCs)." D. Griffith, *Seasonal Agricultural Labor and Recruitment Methods in the Eastern United States: An Overview With Special Attention to the Northeast* (1991), Commission Report, Appendix II at 1041 (hereafter "Griffith").

Growers also frequently assign crewleaders to supervise their farmworkers. *See* Commission Report at 46-47. A recent study of Florida's farm labor market found:

> Many of the problems of farmworker in Florida can be attributed to the use of crew leaders to hire and manage farmworkers. . . . With the exception of a few large farms . . . , crew leaders are the only "bosses" that most farmworkers will ever deal with.

American Civil Liberties Union, *The Hands That Feed Us: Undocumented Farmworkers in Florida* 47-48 (1986).

The crewleader here, John Miller, Jr., performed tasks in addition to recruitment and supervision, but this, too, is common. "Traditionally, FLCs have fulfilled a variety of functions in addition to their principal functions of supplying and supervising labor." Griffith at 1041. "In addition to providing jobs and serving as supervisors, contractors often involve themselves further with workers' lives by supplying or helping them arrange

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[3] The NAWS Study, a national survey of field workers in perishable crops, was commissioned by the United States Department of Labor as part of its response to the 1986 amendments to the immigration laws.

for housing, transportation, meals, loans and a variety of other services." Commission Report at 46-47. As one commentator noted:

> Everything of importance to the farmworker is affected by the labor contractor - how he gets a job, terms of his employment, his transportation to and from work, his housing and that of his family, medical services - the whole gamut of his relationship with the ultimate employer, the grower.

A Caste of Despair at 26. *See Symposium: Legal Problems of Agricultural Labor*, 2 U.C. Davis L. Rev. 1, 39-53 (1970).

Growers' utilization of farm labor contractors has been increasing in recent years. Commission Report at 46. Currently, there are 11,432 registered farm labor contractors in the United States, who employ 532,901 farmworkers. United States Department of Labor, Wage & Hour Division, MSPA Registration Statistics (Aug. 26, 1994). "Workers employed through farm labor contractors generally receive lower wages and are employed under working conditions inferior to those offered to workers hired by other agricultural employers." Commission Report at xxvii. For example, the piece rates paid to workers employed by FLC's sharply declined in real terms from $7.11 in 1989 to $5.01 in 1991. Commission Report, Case Studies at 684. FLC-employed piece rate workers also averaged nearly two dollars less per hour than piece rate workers who were directly employed by a grower. *Id.* In addition, the average annual income for FLC-employed farmworkers was $4,700 (in real 1989 dollars) as compared to $6,900 for farmworkers who were directly employed by the grower. *Id.* at 685. "The difference in income reflects not only the higher earnings of non-FLC workers in agriculture, but also their longer employment . . . and their greater likelihood of receiving Unemployment Insurance benefits when out of work." *Id.* Farmworkers who are directly employed by growers tend to receive higher unemployment insurance benefits, in part because growers are more likely to report their earnings than are crewleaders. *Id.*

A study of citrus pickers in Ventura County, California, graphically illustrates how growers improperly use crewleaders to reduce their labor costs. *See* United States General Accounting Office, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* 37-38 (GAO/PEMO-88-13BR) (1988). In the 1970's citrus workers were largely legal residents who belonged to the United Farm Workers of America, AFL-CIO ("UFW"). In the decade between 1970 and 1980, the UFW won contracts for the citrus workers which included health insurance, pensions and vacation benefits. Between 1980 and 1985, however, the UFW was replaced by farm labor contractors using crews composed primarily of undocumented workers.[4] By 1985, the union had been ousted and the citrus workers had lost wages and benefits "worth at least 18 percent of their total compensation." *Id.* at 38. As a result, "(s)ome of the veteran workers left the industry, but many remained to work at the lower levels of compensation." *Id.*

C. The Abuses of the Crewleader System

"Agriculture is perhaps unique for its substantial number of middlemen whose raison d'être is reducing labor costs by violating labor laws." Philip L. Martin, *Seasonal Workers Background and Issues* 38 (Nat'l. Comm'n. for Employment Policy, Research Rept. RR-85-04, 1985).[5] All too often, crewleaders profit by "stealing social security taxes, tampering with time cards, or absconding with the payroll." M. Linder, *Migrant Workers And Minimum Wage: Regulating the Exploitation of Agricultural Labor in the United States* 37 (1992). Many labor-intensive agricultural firms have modified their operations to shift the management of routine seasonal labor jobs to farm labor contractors, in hopes of evading potentially large penalties for

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[4] Interestingly the undocumented workers "were less experienced and picked more slowly" than the legal workers whom they replaced. *Id.* at 37.

[5] Professor Philip L. Martin served as a Commissioner on the United States Commission on Agricultural Workers.

violations of immigration or labor laws. Leo C. Polopolus and Robert D. Emerson, *Entrepreneurship, Sanctions, and Labor Contracting*, Southern Journal of Agricultural Economics 23, 57-68 (1991).

Congressional hearings revealed, *inter alia*, that crewleaders were misrepresenting the nature and availability of work to farmworkers, providing them with false information on the terms and conditions of employment, forcing workers to buy goods and services from the contractor at excessive prices, committing payroll irregularities and supplying inadequate housing. *See* Commission Report at 46-47. These revelations among others led to the passage of the AWPA. *See* § II, *infra*. This statute specifically adopted the joint employer doctrine which imposes obligations on the fixed situs growers when the farmworkers are economically dependent upon them. Under this doctrine, growers as well as crewleaders are responsible for ensuring, *inter alia*, that workers receive accurate recruitment information, that workers are actually paid the wage rate promised, that workers receive no less than the legal minimum wage, and that employment taxes are properly deducted and paid. The litigation that has followed enactment of the AWPA demonstrates that these protections remain vitally necessary. Agricultural employers still, all too often, fail to pay farmworkers all or part of the wages due them. *See, e.g., Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 125-26 (3d Cir. 1984) (workers not paid for partially filled bins); *Cruz v. Val-A-Da, Inc.*, 127 Lab. Cas. (CCH) ¶ 33,072 (N.D. Ohio 1993) (workers not paid wages for several weeks); *Leach v. Johnston*, 812 F. Supp. 1198, 1212-13 (M.D. Fla. 1992) (employer improperly deducted meal costs from workers' wages); *Maldonado v. Lucca*, 636 F. Supp. 621, 624 (D.N.J. 1986) (employer's willingness to pay wages due on condition that workers waive related claims was "a duplicitous attempt to capitalize on the workers' utter lack of bargaining power"); *Bueno v. Mattner*, 633 F. Supp. 1446, 1454 (W.D. Mich. 1986), *aff'd*, 829 F.2d 1380 (6th Cir. 1987) (workers not paid wages due them); *Davis v. Williams*, 622 F. Supp. 386, 387 (W.D.N.Y.

1985) (worker received a $10 loan, but no pay and had to make his own way back to North Carolina).

In addition, farmworkers continue to be misled about the terms and conditions of employment. *See, e.g., Martinez v. Shinn*, 992 F.2d 997, 998 (9th Cir. 1993) (employer failed to provide work until two weeks after promised starting date and unilaterally cut pay rate); *Escobar v. Baker*, 814 F. Supp. 1491, 1504 (W.D. Wash. 1993) (workers not told wage rate, crops to be picked, or cost of housing); *United States Dep't of Labor v. Anthony*, Lab. L. Rep. (CCH) ¶ 32,293 (Dec. 20, 1993) (workers were promised $.50 per bushel but paid $.40 per bushel).

Frequently no accurate records are kept of the hours worked or wages paid. *See, e.g., Williams*, 747 F.2d at 125 (although workers did not take breaks, one hour per day was routinely deducted for lunch); *Beliz v. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1322 (5th Cir. 1985) (workers were paid $.30 per bucket, but their wage statements said they earned $.40 per bucket); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983) (illiterate crewleader assigned to keep records, but didn't do so); *Sanchez v. Overmyer*, 845 F. Supp. 1183, 1190 (N.D. Ohio 1993) (employers' records failed to set forth basis on which wages were paid, number of piece work units earned and purpose of each wage deduction, and combined work of more than one individual in a single statement); *Antunez v. G & C Farms, Inc.*, 126 Lab. Cas. (CCH) ¶ 33,015 (D.N.M. 1993) (employers often failed to record hours worked, addresses, Social Security numbers, or piece rate on payroll records and recorded information for more than one worker under a single name); *Bueno*, 633 F. Supp. at 1454 (no records kept of hours worked); *Bresgal v. Brock*, 637 F. Supp. 271, 277, (D. Or. 1985), *aff'd and amended*, 843 F.2d 1163 (9th Cir. 1987) (same).

On many occasions, employment taxes are not paid. Indeed, "S[ocial] S[ecurity] A[dministration] data for 1989 show that agricultural employers were at least three times as likely as other employers not to report or to underreport their employees' earnings." United States General Accounting Office, *Hired*

Farmworkers: Health at Risk 5 (GAO/HRD-92-46) (1992). *See, e.g., Calderon v. Witvoet*, 999 F.2d 1101, 1105 (7th Cir. 1993) (employer failed to deduct or pay Social Security taxes); *Beliz*, 756 F.2d at 1324 (no unemployment or Social Security taxes were paid on workers' wages); *Antunez*, 126 Lab. Cas. (CCH) ¶ 33,015 (same); *Sanchez v. Overmyer*, 845 F. Supp. at 1188 (same); *Bresgal*, 637 F. Supp. at 277 (same); *Certilus v. Peeples*, 101 Lab. Cas. (CCH) ¶ 34,587 (M.D. Fla. 1984) (same).

Moreover, employers continue to resist attempts to investigate AWPA violations. *See Donovan v. Mehlenbacher*, 652 F.2d 228, 229-30 (2d Cir. 1981) (farmer refused to answer a subpoena issued in a DOL investigation); *Matter of Hylton Hedman*, Lab. L. Rep. (CCH) ¶ 32,296 (Feb. 25, 1994) (farm labor contractor told worker not to divulge information to DOL investigator); *Brock v. Elsberry*, 663 F. Supp. 359, 366 (M.D. Fla. 1987) (employer repeatedly refused to allow DOL to conduct private investigative interviews).

Farmworkers seeking relief for FLSA/AWPA violations from their crewleaders often come up empty-handed. The record of John Miller, Jr., the labor contractor involved in *Aimable*, vividly illustrates this problem. Miller's violations of the statutes designed to protect farmworkers span the entire twenty-five years he worked for Long & Scott Farms. Yet despite repeated injunctions and orders to pay money damages, Miller has continued to violate the law. *See, e.g., Dunlop v. John Miller, Jr.*, No. 75-484 (E.D. Va. Sept. 12, 1975) (Miller enjoined to comply with FLCRA); *Washington v. Miller*, No. 82-343-ORL-CIV-EK (M.D. Fla. April 26, 1983), *aff'd*, 721 F.2d 797 (11th Cir. 1983) (trial court found that Miller had misrepresented nearly every term of employment, failed to keep accurate payroll records or provide adequate wage statements, housed workers in unsanitary facilities, and paid the workers less than the minimum wage in violation of FLSA and FLCRA); *Brock v. John Miller, Jr.*, No. 86-606-CIV-ORL-18 (M.D. Fla. May 20, 1987) (enjoining Miller from further violations of the AWPA and ordering him to pay $50,433.06 in back wages and $25,716.53 in liquidated damages under FLSA). The Administrator of the

Department of Labor Wage and Hour Division has also found that Miller charged his workers twice the reasonable value of the meals he furnished. Nonetheless, none of these measures has halted Miller's operations or brought an end to his abuses. *See* Roland, *Abuse follows migrant workers: Haitians say crewleader didn't pay them, then had them beaten up,* Palm Beach Review, December 13, 1991 at A14. These same kinds of FLSA/AWPA violations are at issue in the case at hand. But the petitioners will not be able to collect any judgment from Miller because he has filed for bankruptcy. *In re: John Miller, Jr., Rudeen Quince Miller, Debtors*, No. 94-2166-8G3 (U.S. Bankr. Ct., M.D. Fla.)

II. CONGRESS ADOPTED A BROAD JOINT EMPLOYER DOCTRINE TO PROTECT FARM-WORKERS FROM THE ABUSES ASSOCIATED WITH CREWLEADERS

Congress recognized that many workers would not receive minimum wage and other basic labor protections if the law placed responsibility for compliance exclusively on the shoulders of farm labor contractors. Consequently, the Fair Labor Standards Act and the Migrant and Seasonal Protection Act replaced the common law test of employment with a broadly applicable joint employer doctrine. Under this doctrine, courts must determine whether, as a matter of economic reality, farmworkers are dependent on a putative employer.

A. In Enacting FLSA and AWPA, Congress Specifically Targeted Abuses Associated With The Use Of Farm Labor Contractors

1. The Definition of Employer Under the FLSA

The original purpose of the Fair Labor Standards Act, passed in 1938, was to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *D.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), quoting Message of the President to

Congress, May 24, 1934. To this end, the FLSA contains an explicit and deliberate definition of the term "employ," which, then Senator Hugo Black, the bill's sponsor, characterized as "the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657 (1937). Describing this definition, the Court noted, "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). One of the practical consequences of this broad definition was to prevent businesses from escaping responsibility based on the presence of a labor contractor. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

2. The Farm Labor Contractors Registration Act of 1963

In 1963, Congress concluded that the "plight of the migrant laborer in this country is an inexcusable and cancerous sore in the body politic." 110 Cong. Rec. 19,896 (1964) (statement of Rep. Bennett). Farmworkers' "transportation and living conditions are far below the general standard of living -- are indeed inhuman, the very worst conditions of human life in this country, totally unacceptable for human beings." *Id.* at 19,894 (statement of Rep. Powell). At the same time, it was noted that few of the "protective measures of federal law enjoyed by other workers are extended to migratory laborers." *Id.* at 19,986 (statement of Rep. Ryan). Secretary of Labor Willard Wirtz testified that neither state nor federal law safeguarded migrant workers: "It is an anomaly that the workers who stand in the greatest need of social and economic protection are the ones who have been denied such protection." *Migratory Labor Bills: Hearings on S. 521 and Other Bills Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 29 (1963) (statement of Secretary of Labor Willard Wirtz).

The Farm Labor Contractor Registration Act, Pub. L. No. 88-582, 78 Stat. 920 (1963) ("FLCRA"), was enacted to stem the tide of "exploitation and abuse" of migrant workers at the hands of the farm labor contractors or crewleaders who transported and

managed the workers for farmers. S. Rep. No. 202, 88th Cong., 1st Sess. 2 (1963). The focus of the new legislation was solely on the crewleader, who was required to obtain a certificate of registration from the Department of Labor as a condition of engaging in the activities of a farm labor contractor. Grounds for revocation of the certificate included giving false or misleading information to migrant workers concerning the terms of agricultural employment. Crewleaders were also subject to a fine for willful violations of the Act.

3. The Fair Labor Standards Amendments of 1966

In 1966, Congress acted to extend the benefits and protections of the FLSA to an estimated 7.2 million workers, including the nation's agricultural workers, who had been excluded from the original legislation. 112 Cong. Rec. 11376 (1966) (statement of Rep. Greene). Congress found that the exclusion of farmworkers from minimum wage protections was inequitable and inconsistent with the Act's purpose. In extending the Act's protections to farmworkers, Congress specifically recognized that questions would arise as to whether the farmworkers were the employees of the farmer or of a farm labor contractor. The Senate Committee fully endorsed the approach taken by this Court in *Rutherford Food Corp. v. McComb*, 331 U.S. 722. In *Rutherford*, the Court made clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the "total situation controls." *Id.* at 730. The Committee approved of the criteria which aided the Supreme Court in assessing the total situation: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the opportunity for profit or loss; (4) the initiative, judgment, or foresight exercised by the one who performs the services; (5) the amount of investments; and (6) the degree of control which the principal has in the situation. S. Rep. No. 1487, 89th Cong. 2d Sess. (1966) *reprinted in* 1966 U.S.C.C.A.N. 3012-13.

4. The 1974 Amendments to FLCRA

In 1974, Congress found that FLCRA's exclusive focus on the crewleader had been an abject failure: "It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act was intended to regulate has become the rule rather than the exception.... It is quite evident that the Act in its present form provides no real deterrent to violations." S. Rep. No. 1206, 93d Cong. 2d Sess. 3 (1974) ("1974 S. Rep."). A 1973 Labor Department study had found that two-thirds of labor contractors had never registered and that 73% were violating FLCRA's worker protections. H.R. Rep. No. 1493, 93d Cong., 2d Sess. 6 (1974). In the entire decade since FLCRA's enactment, the Department of Labor had referred only four cases to the Justice Department for prosecution, and only one contractor had been tried and convicted. 1974 S. Rep. at 3. In addition to creating a private cause of action for aggrieved workers, the 1974 amendments to FLCRA prohibited the use of unregistered labor contractors by growers and broadened the definition of "farm labor contractor" to include not only traditional transient crewleaders but also a number of fixed-situs employers. This soon led to complaints from growers who bitterly resented the bureaucratic burdens of registering as farm labor contractors and being fingerprinted "as if they were crewleaders with no fixed addresses or financial integrity." *Hearing on the Migrant and Seasonal Agricultural Worker Protection Act: Hearing on H.R. 7102 Before the Subcom. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 44 (1982) (statement of Robert Collyer, Deputy Under Secretary of Labor) ("*1982 House Hearing*"). *See also*, H.R. Rep. No. 885 at 3-4. Department of Labor enforcement of the FLCRA became bogged down in the pursuit of technical registration violations against fixed situs employers and in litigation over the definition of "farm labor contractor." H.R. Rep. No. 885 at 2; *1982 House Hearing* at 50 (statement of Robert Collyer, Deputy Under Secretary of Labor).

5. The Migrant and Seasonal Agricultural Worker Protection Act of 1983

The twenty-year effort to reform the farm labor market by regulating farm labor contractors had "failed to reverse the historical pattern of abuse of migrant and seasonal farmworkers." H.R. Rep. No. 885 at 2-3. To redress these problems, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2584 (1983) (codified at 29 U.S.C. §§ 1801-72) ("AWPA"). Although the AWPA repealed the FLCRA in its entirety, *see* H.R. Rep. No. 885 at 34, in most respects the statute was simply renamed and re-enacted. The only sense in which the AWPA took a "completely new approach" to the farmworker problem, *Id.* at 3, was in abandoning the FLCRA's attempt to police all conduct through the single locus of the often-transient crewleader. Thus, the AWPA reclassified fixed situs employers as "agricultural employers" or "agricultural associations" and made them directly responsible for compliance with the Act's substantive worker protections.

The AWPA expressly provides that the term "employ" be given the same "meaning given such term under section 3(g) of the [FLSA]." 29 U.S.C. § 1802(5).[6] The use of the FLSA definition "was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute." H.R. Rep. No. 885 at 6. Indeed, the joint employer doctrine was to be "the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties." *Id.* Congress recognized that the very question posed by the instant case would frequently arise in the agricultural setting and

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[6] The AWPA defines "agricultural employer" to mean "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who...employs....any migrant or seasonal agricultural worker." 29 U.S.C. § 1802(2).

reiterated its approval of *Rutherford* and its progeny in the agricultural sector:

> [W]here an agricultural employer . . . asserts that the agricultural workers in question are the *sole* [sic] employees of an independent contractor/crewleader . . . , it is the intent of the Committee that the formulation as set forth in *Hodgson v. Griffin & Brand of McAllen, Inc.* be controlling. This decision makes it clear that even if a farm labor contractor is found to be a bona fide independent contractor, . . . this status does not as a matter of law negate the possibility that an agricultural employer may be a joint employer . . . of the harvest workers and jointly responsible for the contractor's employees.

Id. at 7. Congress further found that the adoption of the FLSA's concept of joint responsibility "presented the best means by which to insure that the purposes of this Act would be fulfilled." *Id.*

B. Congress Sought To Eliminate The Denial Of Minimum Wage And Other Labor Protections Associated With Labor Contractors By Adopting A Broadly Applicable Joint Employer Doctrine

The joint employer doctrine was adopted to ensure that the protections of AWPA and FLSA would not be routinely undercut. Congress recognized that its legislation would be ineffective if companies that sought to comply with these laws experienced economic pressure from competitors who were willing to flout the FLSA and the AWPA through the use of unscrupulous farm labor contractors. The FLSA

> seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. . . . *This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage according from savings in costs based upon substandard labor conditions.*

Roland Electrical Co. v. Walling, 326 U.S. 657, 669-70 (1946) (emphasis added). Accordingly, section 2(a)(3) of the FLSA

declares that substandard labor conditions constitute "an unfair method of competition in commerce." 29 U.S.C. § 202(a)(3). Indeed, the deleterious effects of low labor standards upon competition in interstate commerce provided a primary constitutional basis for this legislation. *United States v. Darby*, 312 U.S. 100, 115 (1941).

To deter unfair competition that would lead to the undercutting of the minimum wage, Congress defined the term "employ" as "including to suffer or permit to work." *Nationwide Mut. Ins. v. Darden*, 112 S.Ct. 1344, 1350 (1992), (citing *Rutherford*, 331 U.S. at 728); H.R. Rep. 885 at 6. This definition is of "striking breadth" in comparison to the traditional common law definitions. *Id.*

The federal definition of "employ" was taken from similar provisions in state child labor laws, like the one enacted by New York State. *See Rutherford*, 331 U.S. at 728 n. 7, cited in *Nationwide Mutual*, 112 S.Ct. at 1350. The broad sweep of such statutory definitions induced companies that had the power to ensure compliance with the law to do so and withdrew incentives to ignore the law and blame intermediaries for permitting violations. As then Judge Cardozo said,

> *He must neither create nor suffer in his business the prohibited conditions*. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. . . . He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.' . . . What is true of employment, must be true of the sufferance of employment. . . . Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. . . . *Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided.*

People on Inf. of Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474 (1918) (affirming criminal conviction of company

for violation of child labor law by its milk truck drivers) (emphasis added). The "suffer or permit to work" standard was also designed to prevent companies with great economic power from demanding that financially weak workers or contractors bear sole responsibility under labor protective laws. As Judge Learned Hand said in comparable circumstances, it would undermine the purpose of the legislation, if employees

> are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital. . . . *This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage*. . . . It is true that the statute uses the word "employed," but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. *He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers*.

Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-52 (2d Cir. 1914) (emphases added).[7]

Congress' broad definition of employer under the FLSA and the AWPA has the added benefit of maximizing a company's ability to predict with certainty its obligation to comply with these statutes. *See United States v. Rosenwasser*, 323 at 363 ("the unrestricted sweep of the term 'employee' serves to inform employers with definiteness and certainty that they are . . . liable

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[7] Judge Learned Hand said that these types of statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal*, 218 F. at 553. Ironically, the Eleventh Circuit said that it rejected petitioners' argument as based on "the laws that bind the Euclidian world," and as following "the transitive property of geometry." *Aimable*, 20 F.3d at 442.

for . . . violations of the Act"). It also offers workers greater certainty that they will benefit from these protections.

III. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER CIRCUIT COURTS AND DEVASTATES FARMWORKERS' ABILITY TO SECURE MINIMUM LABOR PROTECTIONS IN CIRCUMSTANCES THAT TYPICALLY ARISE IN AMERICAN AGRICULTURE

The Eleventh Circuit decision in *Aimable* will profoundly affect agricultural labor relations in that circuit and elsewhere because the economic relationships at issue commonly arise in American agriculture. *See* § I, *supra*. Faced with the same "economic reality," other appellate courts have determined that the joint employer doctrine imposes liability on both the grower and the crewleader. The analysis which led to the Eleventh Circuit's anomalous conclusion is in fundamental conflict with the statutory language of the FLSA and the AWPA and the judicial precedents interpreting them.

The FLSA/AWPA definition of "employ," as the Eleventh Circuit acknowledged, requires the court to determine whether, as a matter of economic reality, the farmworkers are dependent on the putative employer. *Aimable*, 20 F.3d at 439, citing *Rutherford*, 331 U.S. at 729-30; *see Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961); *Bartels v. Birmingham*, 332 U.S. 126 (1947); H.R. Rep. No. 885 at 7. Nonetheless, the Eleventh Circuit did not comply with this obligation.

This Court's decision in *Rutherford* illustrates how to evaluate the economic reality in analogous circumstances. In that case, the Court found that a slaughterhouse employed its meat deboners even though they were hired and supervised by a contractor. The deboning occurred in the middle of the overall process of slaughtering the cattle, preparing the meat for deboning, packing it and shipping it, all of which was done by slaughterhouse employees. *Rutherford*, 331 U.S. at 729. While the contractor was to have "complete control" over his employees, the

slaughterhouse did intervene to exercise some supervision. *Id.* at 725, 730.

The Court ruled that the deboners were employed by the slaughterhouse largely because under "the circumstances of the whole activity," the deboners "did a specialty job on the production line," *Rutherford*, 331 U.S. at 730, and were "part of the integrated unit of production." *Id.* at 729. Consequently, they "were more like" persons following "the usual path of an employee." *Id.* The Court also noted that the putative employer, not the contractor, owned the premises and the deboning equipment, and that the work, though skilled, "was more like piecework." *Id.* at 730. The Court also found that the contractor did not exercise any significant "initiative, judgment or foresight." *Id.* In reversing the lower court for its reliance on "isolated factors," the *Rutherford* Court held that a proper evaluation must consider "the circumstances of the whole activity." *Id.* at 730.

The Eleventh Circuit's analysis in *Aimable* cannot be squared with *Rutherford*. Here, the harvesting and packing jobs which Miller's crew members performed were integral to the grower's overall production process of planting, cultivation, harvesting, packing and shipping of vegetables. In *Aimable*, as in *Rutherford*, the contractor's employees could not perform their jobs without the facilities and equipment provided by the putative employer. Similarly, in *Aimable* as in *Rutherford*, the workers and the contractors were paid by the piece and neither were required to exercise any judgment or initiative. There exists no significant feature in the instant case that distinguishes it from *Rutherford*.

The Eleventh Circuit committed the same error of law that caused the reversal of the lower court's decision in *Rutherford*. Rather than evaluate the economic reality as a whole, the appellate court's decision was based on several isolated factors. In *Aimable*, unlike *Rutherford*, the court never identifies the essential nature of the economic relationships among the crewleader, the farmworkers and the grower. Had it done so, it would have found the essence of the economic relationships in *Aimable* and *Rutherford* to be the same: A contractor was hired

to recruit and supervise workers but the grower provided the facilities, the equipment, the production process, the business acumen and the decisionmaking which made the workers economically dependent on the grower. *Aimable* permits an employer that effectively determines every important aspect of farmworkers' jobs to evade liability for FLSA and AWPA violations by delegating to an allegedly independent crewleader the same responsibility for control and supervision it would ordinarily assign to an employee-foreman. But in circumstances such as these, the farmworkers are economically dependent on the grower, whether the crewleader or the employee-foreman supervises the farmworkers in the field.

The Eleventh Circuit's decision also conflicts with decisions of the Fifth, Seventh, Ninth and Tenth Circuits that have applied *Rutherford* in the agricultural context. *See, e.g., Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); *Hodgson v. Griffin & Brand Of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973); *Fahs v. Tree-Gold Co-op Growers, Inc.*, 166 F.2d 40 (5th Cir. 1948); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979)[8]; *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973).

The Eleventh Circuit's restrictive construction, if followed, signals the end of the joint employer doctrine in the Eleventh Circuit and possibly in other circuits as well. Farmworkers

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[8] The Eleventh Circuit contends that "there was no farm labor contractor involved" in *Real*, *Aimable*, 20 F.3d at 443, but the court is wrong. The Ninth Circuit in *Real* stated that on remand DSA might turn out to be the employer of the workers either: (1) because DSA effectively controlled the contractor (Driscoll) so that Driscoll was an employee of DSA and not an independent contractor; or (2) because, even though Driscoll was an independent contractor, DSA and Driscoll shared control over the strawberry workers so as to be joint employers of the workers. *Id.* at 755-56.

throughout the country face virtually the identical economic realities as the petitioners in *Aimable*. Thus, in the Eleventh Circuit and any other jurisdiction that adopts the Eleventh Circuit's analysis, *Aimable* is likely to substantially reduce the number of farmworkers receiving these minimum protections and impair their ability to recover damages for their losses. Growers who thought that they were obligated to ensure payment of the minimum wage and provision of other basic protections, despite the presence of a crewleader, will now feel free to ignore those protections. Such conduct will pressure competitors of such growers to lower their labor costs by adopting similar practices. Insolvent crewleaders will once again be the only available defendant in many FLSA and AWPA lawsuits.

Thus, *Aimable* will produce precisely the result Congress sought to avoid. The farmworkers' only recourse for the denial of the AWPA and FLSA requirements will be against the party who has the least resources, is the least amenable to regulation and who, as matter of economic reality, has the least ability to determine the workers' real wages and working conditions.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted and the *Aimable* decision should be reversed.

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